

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE RIVERA,

Defendant and Appellant.

D052935

(Super. Ct. Nos. SCS213442,
SCS207555)

APPEAL from a judgment of the Superior Court of San Diego County, John M. Thompson, Judge. Reversed in part; affirmed in part.

Jorge Rivera appeals the judgment entered after a jury convicted him of forcible rape (Pen. Code,¹ § 261, subd. (a)(2)) (count 1), two counts of rape by a foreign object by means of force (§ 289, subd. (a)(1)) (counts 2-3), forcible oral copulation (§ 288a, subd. (c)(2)) (count 4), assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)) (count 6), false imprisonment by violence, menace, fraud, or deceit (§§ 236, 237,

¹ All further statutory references are to the Penal Code unless otherwise specified.

subd. (a)) (count 7), and attempting to dissuade a witness from reporting a crime (§ 136.1, subd. (b)(1)) (count 9). He contends the court erred by not staying execution of the sentences for counts 6, 7, and 9 under the section 654 prohibition of multiple sentences and by increasing the fines imposed in a prior case, probation for which was revoked in connection with the instant case.

FACTS

In July 2007, F. W. and Jorge Rivera shared a condominium and had a friendly, nonromantic relationship. At the end of July, F. W. moved out. On August 27, 2007, F. W. returned to the condominium to retrieve clothes left when she moved. F. W. and Rivera watched movies while she washed clothes. By the time F. W. was ready to leave, it was late. Rivera offered to let her spend the night on the floor in his room rather than requiring her to ride the bus and trolley home at night.

F. W. slept on the floor and woke during the night when she felt something touch her leg. Rivera was sitting beside her. He was naked and holding a knife. F. W. jumped up, turned on the light, and asked Rivera what he was doing. He replied: "Fuck it. If you are awake, I'm going to do it." As F. W. tried to leave, Rivera grabbed her by the neck and held a knife to her side. Over the course of 30 to 45 minutes, as F. W. struggled to free herself, appellant threatened to kill F. W. He engaged in a violent physical attack during which he choked her three times to near unconsciousness. A medical witness testified such strangulation could cause seizures. Indeed, the choking was so severe F. W. lost control of her bladder. While he was choking her, Rivera put his fingers in

F. W.'s vagina. After losing consciousness the third time, F. W. decided not to try to escape, but she continued struggling.

Using the knife, Rivera pushed F. W. onto his bed and told her to "shut up" and "open [her] legs." Rivera licked her vagina and put his fingers in her vagina several times. He tried to put his penis in her vagina but could not because he was not fully erect. Rivera told her to get him hard or he would kill her. F. W. asked him to put on a condom. Rivera complied and continued "to push himself into [her]." During the struggle, F. W. called 9-1-1 on a cellular telephone, but Rivera grabbed it and hung up. She told him she would not be so scared if he put the knife in another room. When Rivera left the bedroom with the knife, F. W. again dialed 9-1-1 and hid the telephone behind the television.

The assault ended only when a neighbor, frightened by F. W.'s pleas and screams, called the police. When Rivera saw police officers at the door, he told F. W.: "It's the cops" and "I don't want to go to jail." F. W. told Rivera she would answer the door and say nothing was wrong. Instead, she ran outside and told the officers Rivera was upstairs with a knife. The officers arrested Rivera.

The court sentenced Rivera to 52 years 8 months in state prison. He received 12 years (6 years doubled for a prior strike conviction) to be served consecutively for each of counts 1 through 3; 12 years (6 years doubled) for count 4, but the execution of the sentence was stayed under section 654; 6 years (3 years doubled) for count 6, plus 3 years under section 12022.7 for inflicting great bodily injury, to be served consecutively to counts 1 through 3; one-third the middle term, doubled to 16 months for each of counts 7

and 9 to be served consecutively with counts 1 through 3; and 5 years for a prior serious felony conviction.

Rivera was on probation in another San Diego County case when he raped F. W. The court in the prior case imposed a \$200 restitution fine under section 1202.4, subdivision (b), and a \$200 parole revocation restitution fine under section 1202.44. At his sentencing for the crimes committed against F. W., the court revoked probation in the prior case, and in the prior case imposed a \$500 restitution fine under section 1202.4 and a \$500 parole revocation restitution fine under sections 1202.44 and 1202.45

DISCUSSION

I

Penal Code Section 654

Section 654 prohibits multiple sentences where a single act violates more than one statute or where the defendant commits different acts that violate different statutes but the acts comprise an indivisible course of conduct with a single intent and objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19-20.) If one offense is the means of perpetrating another, section 654 prohibits multiple sentences. (*Ibid.*) However, in some circumstances in which one offense is the means of perpetrating another, violence may be so extreme that the second offense is no longer incidental to the first and becomes its own end. (*See, e.g., People v. DeLoach* (1989) 207 Cal.App.3d 323, 337.) As the trial court implicitly found, this is such a case. The nearly 45-minute assault on F. W., during which time appellant assaulted F. W., threatened to kill her with a knife and choked her to unconsciousness three times, supports the court's sentence. While rape is a crime of

physical violence, the law recognizes there is a point beyond which severe, gratuitous acts of criminal violence albeit perpetrated in order to achieve a "goal crime," support a court's denial of a request to stay those crimes.²

For the same reasons noted, given the lengthy assault on F. W., we conclude the court did not err in failing to stay execution of Rivera's sentence for count 7, false imprisonment.

Finally, the court properly did not stay Rivera's sentence for count 9, attempting to dissuade a witness from reporting a crime. As the People note, the evidence supports the conclusion Rivera already completed the rape and rape by a foreign object before grabbing the telephone from F. W. and preventing her from calling 9-1-1 a second time.

II

Restitution and Parole Revocation Fines

When a defendant is convicted of a crime, the court must impose a restitution fine unless an extraordinary and compelling reason justifies the absence of a fine. (§ 1202.4, subd. (b)(1).) When a defendant receives probation, the court imposes an additional probation revocation fine in the same amount as the restitution fine. (§ 1202.44; *People v. Smith* (2001) 24 Cal.4th 849, 853 (*Smith*).) If probation is later revoked, the probation revocation fine becomes due. No statute authorizes a court to impose a new fine at probation revocation. (*People v. Arata* (2004) 118 Cal.App.4th 195, 201-202.)

² We note that at the time of his sentence, appellant did not request counts 6, 7, and 9 be stayed.

The court's imposition of the \$500 restitution fine in the prior case was unauthorized, and the court should have ordered payment of the original restitution fine of \$200. Because the original restitution fine was \$200, the court should have imposed a \$200 parole revocation fine. (*Smith, supra*, 24 Cal.4th at p. 853.) Accordingly, we reverse the \$500 restitution and parole revocation fines and reduce the fines to \$200.

DISPOSITION

We reverse the \$500 restitution and parole revocation fines and reduce the fines to \$200 each. In all other respects the judgment is affirmed.

BENKE, J.

I CONCUR:

McCONNELL, P. J.

McDONALD, J., Concurring and Dissenting.

I agree with the majority opinion that the \$500.00 restitution and parole revocation fines in the prior case should be reduced to \$200 each. However, contrary to the majority opinion, the execution of sentences for count 6 (assault by means likely to produce great bodily injury), count 7 (false imprisonment by violence, menace, fraud or deceit) and count 9 (attempting to dissuade a witness from reporting a crime) should be stayed under Penal Code¹ section 654. In all other respects, I agree the judgment should be affirmed.

Section 654 prohibits multiple sentences where a single act violates more than one statute or where the defendant commits different acts that violate different statutes but the acts comprise an indivisible course of conduct with a single intent and objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19-20.) If one offense is the means of perpetrating another, section 654 prohibits multiple sentences. (*Neal*, at pp. 19-20.) Courts have found kidnapping, assault, forcibly detaining a victim, and furnishing a minor with narcotics to be means of achieving felonious sexual acts. (See *People v. Failla* (1966) 64 Cal.2d 560, 570 [kidnapping]; *People v. Moore* (1967) 249 Cal.App.2d 509, 511-514 [assault]; *People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1041-1042 [forcibly detaining and furnishing a minor with narcotics].) In some circumstances in which one offense is the means of perpetrating another, violence may be so extreme that the second offense is no longer incidental to the first and becomes its own end. (See, e.g., *People v. DeLoach* (1989) 207 Cal.App.3d 323, 337 [unlawful sex acts indivisible from

¹ All statutory references are to the Penal Code.

pandering because pandering was the means of accomplishing the sex acts, but forcible and violent sex acts were divisible from pandering because pandering can be accomplished without violence].)

Section 654 does not prohibit multiple sentences where a defendant has more than one objective or intent and engages in a single act or an indivisible course of conduct. (See, e.g., *People v. Stephenson* (1974) 10 Cal.3d 652, 659-661 [indivisible course of conduct with multiple intents where defendant kidnapped and robbed a victim then raped the victim, multiple sentences acceptable]; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1514 [single act of carrying a firearm was motivated by two separate intents, multiple sentences acceptable].)

Here, the court erred by not staying execution of Rivera's sentences for his convictions of assault, false imprisonment, and dissuading a witness under section 654. I conclude from a review of the record in this case that Rivera's acts comprised an indivisible course of conduct in furtherance of a single intent and objective--to forcibly rape the victim. Furthermore, the offenses of assault, false imprisonment and attempting to dissuade a witness were means of perpetrating the rape.

The People argue Rivera's violent choking of the victim was not incidental to the rapes, because he already threatened her with a knife. Relying on *People v. Nguyen* (1988) 204 Cal.App.3d 181, they claim the independent nature of count 6 makes its intent divisible and separately punishable from counts 1 through 3. In *Nguyen*, the court concluded, "violence against an unresisting victim . . . may be" nonincidental when it is not a means to achieving the underlying offense. (*Id.* at p. 193.) Here, Rivera used

violence as a means to rape the victim, who was not "an unresisting victim." (*Ibid.*) The victim repeatedly tried to escape and to push Rivera away. Even after losing consciousness three times she continued to resist Rivera. Rape is a violent crime, and here, Rivera's use of force was a means to achieving a violent end. (*People v. DeLoach, supra*, 207 Cal.App.3d at p. 338.) The court erred by not staying execution of Rivera's sentence for count 6 under section 654.

The court also erred by not staying execution of Rivera's sentence for count 7, false imprisonment. Relying on *People v. Saffle* (1992) 4 Cal.App.4th 434, the People argue substantial evidence shows Rivera used the knife to scare the victim into believing she could not leave the room, and this intent was separate from his intent to rape her. In *Saffle*, the defendant raped the victim, then restrained her and threatened her and her children with future violence if she reported the rape. (*Saffle*, at pp. 439-440). Saffle intended to imprison his victim to prevent her from reporting the rape, and this intent was divisible from his intent to rape because the rape was completed. Here, Rivera did not falsely imprison the victim to prevent her from reporting a past crime, like the defendant in *Saffle*. He choked her and held her at knifepoint so he could rape her. (*People v. Moore, supra*, 249 Cal.App.2d at pp. 511-514.) The People agreed at trial, explaining that before the rapes were complete, "as she was trying to get away, trying to get the heck out of there, . . . he stopped her by choking her. Stopped her with the knife." Because Rivera falsely imprisoned the victim with the intention, and for the purpose, of raping her, section 654 bars execution of sentence on count 7.

Finally, the court erred by not staying Rivera's sentence for count 9, attempting to dissuade a witness from reporting a crime. The People argue Rivera already completed the rape and rape by a foreign object before grabbing the telephone from the victim and preventing her from calling the police, similar to the defendant's actions in *Saffle*. No evidence supports the theory that Rivera had completed the rape when he prevented the victim from calling the police. On cross-examination she explained she called 911 before the sexual activity ended. She identified the end of the sexual activity to be when Rivera took the knife out of the room and she then called 911 a second time without interference from Rivera. The People agreed with the victim's characterization of the order of events when they claimed Rivera hung up the telephone the first time, because "he didn't want [the sexual assault] to stop." Rivera intended to dissuade Woodbury from calling the police so he could continue raping her. Accordingly, section 654 bars execution of the sentence for count 9.

The disposition in this case should be to stay execution of the sentences for counts 6, 7 and 9, reduce the restitution and parole revocation fines in the prior case to \$200 each, and in all other respects affirm the judgment.

McDONALD, J.